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In The
Supreme Court of the United States

October Term, 1955

No. 407

GEORGE D. KEY, BENJAMIN M. CASSITY and J. WM. CORDELL,

Petitioners,

VERSUS

A. B. MCDONALD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SEPTEMBER, 1955.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 21, 1955.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court of the Western District of Oklahoma (T. 4-5), is reported at 125 F. Supp. 775, and is printed in Appendix B hereto, *infra*, p. II. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 3-7), is unreported and is printed in Appendix B hereto, *infra*, p. XI.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1955 (R. 3), p. IX, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1

Whether the action of Oklahoma's State Election Board, acting (as was their duty so to do) pursuant to applicable Oklahoma constitutional and statutory provisions, in placing the word "Negro" after respondent's name on the ballot for United States Senator in the Democratic party primary election held July 6, 1954, denied or deprived respondent of any "civil right" resulting in a denial of "equal protection of the laws" under the Fourteenth Amendment to the Constitution of the United States?

2

If question 1 be answered in the affirmative (which petitioners deny); whether respondent has pursued his State rem-

edies so as to give him the right to maintain an action for damages against the individual members of the Oklahoma State Election Board in a federal district court under 42 U. S. C. Sect. 1983?

3

That by reason of his own negligence, laches, acquiescence, silence and inaction when he should have spoken, and acceptance of benefits, the rule of equitable estoppel applies with great force and impact and precludes any right respondent might have had, if such rights ever existed under the law.

4

That the "Manner" of selection of party nominees and election of United States Senators is a State matter and is not regulated by the Constitution or laws of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Oklahoma Constitutional provision involved is Section 11, Article 23, Oklahoma Constitution. The statutory provisions involved herein are Sections 162 and 162a, Title 26, Oklahoma Statutes 1951, and 42 U. S. C., Section 1983. They are printed in Appendix A, *infra*, pp. I-V.

STATEMENT

The record filed herewith consists of two documents certified to by the clerk of the United States Court of Appeals for the Tenth Circuit. The first is styled "TRANSCRIPT OF RECORD — IN THE SUPREME

COURT OF THE UNITED STATES," and consists of the record of this case below, in the Court of Appeals. References herein to said Court of Appeals transcript will be as follows: (R. ---). The other document is made a part of the Court of Appeals record by reference (R. 1), is styled "TRANSCRIPT OF RECORD — UNITED STATES COURT OF APPEALS — TENTH CIRCUIT", and consists of the record of this case in the district court below as filed in the Court of Appeals. References to said district court transcript herein will be as follows: (T. ---).

On August 9, 1954, A. B. McDonald, as plaintiff, filed his petition (T. 1) in the District Court for the Western District of Oklahoma against the defendants, George D. Key, Benjamin M. Cassity and J. Wm. Cordell (members of the State Election Board of Oklahoma), to recover alleged actual and exemplary damages against them "and each of them jointly and severally for the sum of $200,000.00 and costs" by reason of said Election Board's action in placing after his name (as a candidate on the Democratic ticket for United States Senator) on the first (July 6, 1954), statewide primary election ballots the word "Negro" in parentheses, as provided in 26 O. S. 1951 § 162a; said cause of action being predicated upon the alleged violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and 42 U. S. C., Section 1983.

Apparently, the district court's jurisdiction was attempted to be invoked under 28 U. S. C., Section 1343, sub-division 3, but such statute was not plead or referred to in respondent's petition or complaint in the court below.

Said district court (the Honorable Stephen Chandler, Judge) sustained defendant's motion to dismiss. The district court relied upon two grounds in so ruling. In his memorandum opinion, the judge said (T. 5):

> "The placing of the word 'Negro' on a ballot after the name of a candidate is merely descriptive and properly serves to inform the electors of the fact that the candidate is of African descent. It likewise serves to inform the voters that the other candidates are members of the 'white race'. It is, therefore, my opinion that the plaintiff has not been deprived of the equal protection of the laws or any rights, privileges or immunities secured by the Constitution and Laws of the United States.
>
> "I have also come to the conclusion that since the plaintiff failed to exhaust the remedies provided by the laws of the State of Oklahoma, this court is without jurisdiction."

On appeal, the Court of Appeals held (R. 7):

> "The judgment dismissing the action is reversed and the cause remanded for further proceedings in accordance with this opinion."

The issues involved in this petition for a writ of *certiorari* involve the validity of that part of Section 11, Article 23 of the Constitution of Oklahoma, which provides:

> "Wherever in this Constitution and laws of this State, the word * * * 'negro' * * *, are used,

> the same shall be construed to mean or apply to all persons of African descent. The term 'white race' shall include all other persons,"

and that part of 26 O. S. 1951 § 162a, above referred to, which provides:

> "Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the white race, shall have his race designated upon the ballots in parenthesis after his name. This provision shall apply both to Primary and General Elections or either of them, * * *",

as applied to a Negro (as here), whose written and signed notification and declaration of candidacy (26 O. S. 1951 § 162), for nomination on the Democratic ticket to the office of United States Senator stated he was a member of the Negro race.

In this connection, the Court of Appeals, after stating that the trial court held (R. 5):

> "The placing of the word 'negro' on a primary or general election ballot after the name of the candidate, who is of African descent, is merely descriptive and serves to inform the electors that the candidate is of African descent, and that the other candidates are members of the white race; that plaintiff was not denied the equal protection of the laws guaranteed by the Fourteenth Amendment; and that plaintiff had wholly failed to invoke and exhaust the remedies provided by the laws of the State of Oklahoma and, therefore, the court was without jurisdiction,"

in effect held that the above-quoted Oklahoma Constitutional and statutory provisions were invalid, and in connection therewith stated:

"Under the Oklahoma constitutional provision, the phrase 'white race' includes not only that race, but all other races, except the Negro race. Thus, it will be seen that there is a direct discrimination between members of the Negro race and members of the White, Yellow, and other races, all embraced in the phrase 'white race', resulting in a denial under color of law of equality of treatment with respect to the members of the Negro race who run for office in Oklahoma."

Said decision of the United States Court of Appeals not only reversed the decision of the district court, as aforesaid, but, in effect, overruled the October 7, 1948, decision of the three-judge Federal District Court for the Northern District of Oklahoma (Circuit Judge Murrah and District Judges Vaught and Savage) in *Hodge and Moffitte* v. *Tulsa County Election Board* (not officially reported — but see record in the appeal of said case to this Court and the order thereof vacating, but not reversing, said decision, and dismissing said appeal as *moot*, 335 U. S. 889, 93 L. Ed. 427, 69 S. Ct. 250) in an action to enjoin said board from placing after their names the word "Negro" on the November 2, 1948, general election ballots, wherein said three-judge court, in its Conclusions of Law, held as follows:

"The Court further holds that compliance with the statute [26 O. S. 1951 § 162a] in issue does not impose a burden upon the plaintiffs or any member of their race similarly situated which deprives them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Said decision of the United States Court of Appeals is also in conflict with the principles of law announced by the "Circuit Court of Appeals, Tenth Circuit" on December 18, 1944 (Circuit Judges Bratton, Huxman and Murrah), in the case of *Stevens* v. *United States*, 146 F. 2d 120 (and many Oklahoma and federal decisions cited with approval therein), and is in conflict with the principles of law announced by decisions of other circuits as will be more fully pointed out hereinafter under the heading "Reasons for Granting the Writ."

Said decision of the United States Court of Appeals also reversed the trial court in holding that respondent (plaintiff and appellant below), was not required to pursue state remedies before prosecuting the instant damage action, even though respondent did not object to the form of the notification and declaration of candidacy which he filed voluntarily, and even though he made no effort of any kind to prevent the placing of the word "Negro" after his name on the ballot, as required by Oklahoma law.

REASONS FOR GRANTING THE WRIT

1.

The decision of the Court of Appeals is in conflict with the prior (December 18, 1944), opinion of the same court in the case of *Stevens* v. *United States*, 146 F. 2d 120 (Circuit Judges Bratton, Huxman and Murrah).

In the *Stevens case*, the Court of Appeals upheld the validity of Section 11, Article 23, Oklahoma Constitu-

tion as applied to the rights of a person of African descent in connection with a will contest. The court held a marriage of a full-blooded Creek Indian and a Creek Freedman (a person of African descent) was void under Oklahoma law.

Paragraphs 3, 7, 8 and 9 of the syllabus to the *Stevens case* are as follows:

> "3. A Creek Indian of the full blood is a member of the 'white race' within provisions of Oklahoma Constitution declaring that term 'white race' shall include all persons other than persons of African descent, and, accordingly, is within prohibition against marriage with a person of African descent, and such a marriage is a nullity. 43 O. S. 1941 § § 12, 13; Const. Okl. art. 23, § 11.
>
> "7. A state, within range of permissible adoption of policies deemed to be promotive of welfare of society as well as individual members thereof, is empowered to forbid marriages between persons of African descent and persons of other races or descents without violating Fourteenth Amendment. U. S. C. A. Const. Amend. 14.
>
> "8. The Oklahoma statute forbidding marriage of any person of African descent to any person not of such descent is not violative of Fourteenth Amendment. 43 O. S. 1941 § 12; U. S. C. A. Const. Amend. 14.
>
> "9. Oklahoma statutes forbidding marriage of a person of African descent to a person of another race or descent and prescribing same punishment for each party to such a marriage do not discriminate against the colored race within purview of Civil Rights Bill. 43 O. S. 1941 § § 12, 13; 8 U. S. C. A. § 41."

In the instant case, the Court of Appeals held, in effect, that Section 11, Article 23, Okl. Const. is invalid, as being in violation of the Fourteenth Amendment to the United States Constitution (equal protection of the laws).

—2—

The decision of the Court of Appeals, in effect, holds invalid and unconstitutional a provision of the Constitution of the State of Oklahoma (Sect. 11, Art. 23, Okl. Const.), and an Oklahoma statute (Sec. 162a, Title 26, O. S. 1951), as being in violation of the Fourteenth Amendment to the United States Constitution (equal protection of the laws).

—3—

The decision of the Court of Appeals, in effect, overrules numerous decisions of the Supreme Court of Oklahoma which court has upheld and treated as valid the provisions of Sec. 11, Art. 23, Okl. Const. *Blake* v. *Sessions*, 94 Okl. 59, 220 P. 876 (1924); *Scott* v. *Epperson*, 141 Okl. 41, 284 P. 19 (1930); *Eggers* v. *Olson*, 104 Okl. 297, 231 P. 483 (1924); *Baker* v. *Carter*, 180 Okl. 71, 68 P. 2d 85 (1937); *Long* v. *Brown*, 186 Okl. 407, 98 P. 2d 28 (1939).

—4—

As hereinbefore pointed out, the decision of the Court of Appeals, in effect, overrules the October 7, 1948, decision of a three judge Federal district court in the case of *Hodge and Moffitte* v. *Tulsa County Election Board* (not officially reported — but see the record in the appeal of said case to this Court and the order thereof vacating but not reversing said decision, and dismissing said appeal as *moot*, 335 U. S. 889, 93 L. Ed. 427, 69 S. Ct. 250) in an action to enjoin said board from placing after their names the word "Negro" on the November 2, 1948, general election ballots. Said three-judge district court (Circuit Judge Murrah and District Judges Vaught and Savage), in its Conclusions of Law, held as follows:

> "The Court further holds that compliance with the statute [26 O. S. 1951 § 162a] in issue does not impose a burden upon the plaintiffs or any member of their race similarly situated which deprives them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

—5—

The decision of the Court of Appeals is in conflict with the October 7, 1948, decision of the United States Court of Appeals, Fifth Circuit, in the case of *Johnson* v. *Stevenson*, 170 F. 2d 108 (cert. den. 336 U. S. 904, 73 L. Ed. 1069, 69 S. Ct. 491).

Johnson v. *Stevenson* (as in the instant case) involved a state primary election to select party nominees for the office of United States Senator. In said case, the court said (p. 111):

> "But Stevenson does not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it. He is here claiming a political nomination by a primary under laws of Texas. As was remarked in *United States* v. *Gradwell*, 243 U. S. 476, 488, 489, 37 S. Ct. 407, 61 L. Ed. 857, in applying the similar provisions of the Criminal Statute then Sec. 19 of the Criminal Code, now Sec. 241 of Title 18 U. S. C. A., to a nominating primary, there is no applicable provision of the federal Constitution or statutes which secures the rights of a candidate for nomination; and the distinction between the personal right of the voter and the general right of a candidate to a pure final election was made in *United States* v. *Bathgate*, 246 U. S. 220, 226, 227, 38 S. Ct. 269, 62 L. Ed. 676. *We have found no case holding that one claiming a nomination in a primary held under state law, though it be a part of the state election machinery, has any right secured by the laws of the United States*". (Emphasis supplied)

The selection of party nominees and the election of United States Senators is a State matter and is not regulated by the Constitution or laws of the United States. This is, in effect, denied by the decision of the Court of Appeals.

Section 4, Article 1 of the Constitution of the United States is, in part, as follows:

"Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators * * *."

The 17th Amendment to the Constitution of the United States is, in part, as follows:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote * * *."

2 U. S. C., Sect. 1 is as follows:

"At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3rd day of January next thereafter."

The "Times," "Places" and "Manner" of holding elections and selecting United States Senators (and Representatives) is, by Sec. 4, Art. 1, U. S. Const. *supra*, made a matter of State concern, with Congress given authority to intervene, if it so desires, in all matters except as to the "Place" of choosing Senators. *The Congress has not seen fit to enact any such legislation.*

Therefore, the "Manner" of selecting Senators has been completely left to the various States. *Johnson* v.

Stevenson, 170 F. 2d 108, *supra; United States* v. *Gradwell*, 243 U. S. 476, 61 L. Ed. 857, 37 S. Ct. 407, *supra*. The method of printing a ballot and the contents of such a ballot clearly comes within the meaning of the word "Manner" as the same is used in the United States Constitution.

Pursuant to the authority granted the State of Oklahoma by the above quoted provisions of the United States Constitution, the State of Oklahoma adopted Section 5, Article 3, of its Constitution which is, in part, as follows:

> "The Legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for State, District, County, and municipal officers, for all political parties, including United States Senators: * * *."

Acting by virtue of said Oklahoma Constitutional provision, the Legislature enacted laws providing for a mandatory primary system (26 O. S. 1951 § § 111 to 172, inclusive).

Section 162 (Title 26, O. S. 1951), *supra*, provides that a candidate for a party nomination must file a timely notification and declaration of candidacy which "shall be" in a prescribed form, a part thereof being as follows:

"That my race is_____, * * *."
(White or Negro)

Section 162a (Title 26, O. S. 1951), *supra*, is, in part, as follows:

> "Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the White race, shall have his race designated upon the ballots in parenthesis after his name. This provision shall apply both to Primary and General Elections or either of them. * * *"

Section 6, Article 3, Oklahoma Constitution, provides, in part, that the:

> "Legislature shall provide the kind of ticket or ballot to be used * * *."

It follows that the Constitution of the United States has authorized each State of the Union to provide for the election of United States Senators (and nomination, if that be the State system). While Congress has the power and authority to regulate the election (and possibly nomination by parties, if that be a part of the State election procedure), no Federal laws have been enacted covering the situation. The only conclusion to be drawn is that Congress is satisfied with the election laws of the various States of the Union, including the Oklahoma Constitution and laws under discussion.

We therefore submit to the Court that the decision of the Court of Appeals must be reversed for the reason that the Court of Appeals has denied to the State of Oklahoma the right and authority to exercise the power directly given the State of Oklahoma by the United States Con-

stitution in prescribing the "Manner" of electing (and choosing as party nominees for the office of) United States Senators.

—6—

The act of placing the word "Negro" after a candidate's name on the ballot for party nomination does not deprive the candidate of the equal protection of the laws or of any rights, privileges or immunities secured to him by the Constitution or laws of the United States.

There is a definite distinction between the right of a citizen to vote and the right of an individual to seek public office. In this case, the right of an individual to vote is not involved, and may not be involved for the reason that all citizens of Oklahoma have the identical right to vote regardless of race or color.

No Oklahoma law denies any person (who is an elector of the state) the right to seek office, and no party to this action has attempted to point out such a law; and this is true regardless of the individual's race or color.

The district court, on petitioner's motion to dismiss, held the placing of the word "Negro" on the ballot after a candidate's name is merely descriptive and serves to inform the electors that the candidates are, or are not, of African descent and that the other candidates are, or are not, members of the white race. The same re-

sult would have been reached if the word "white" had been required to be placed on the ballot after each white candidate's name.

There is no suggestion on the ballot that the elector either vote or not vote for any particular candidate because of his race or for any other reason. The choice is left exclusively to the voter. In determining the "Manner" of printing the ballots, the Legislature has decided the voter should be informed of each candidate's race, be it white or Negro.

This Court is familiar with the multiplicity of cases which have been prosecuted in this and other Courts wherein the issues revolved around alleged (and sometimes actual) discrimination against members of the Negro race. In more recent years this Court has handed down decision after decision, in effect, holding that discrimination against members of the Negro race violates the provisions of the United States Constitution. Though all individuals do not agree in a particular situation as to whether discrimination is actually being practiced, those who study the basic principles underlying the Fourteenth Amendment to the United States Constitution do not disagree with the proposition that all individuals are entitled to the equal protection of the laws, and that right exists regardless of one's color or race.

The uniformity of more recent decisions of this Court on this subject may not better be typified than to

state the underlying proposition that the Negro has been adjudged to be second to none in the eyes of the law insofar as rights and privileges are concerned. In fact, this has been the contention of the champions of the rights of the Negro from the days of the Civil War to the present time.

It must follow (or our court decisions have been in error) that one is not injured in the eyes of the law by being a Negro or by being called a Negro; for all men are held equal.

How then, may it be said to be an injury to an individual seeking public office to call him that which he is, a Negro? How may it be said to be a violation of one's rights and to constitute a denial of the equal protection of the laws to call a Negro a Negro, when that is merely the simple truth. The same reasoning applies to a white man. It surely would not be said to be a legal injury to call a white man that which he is, a white man.

Oklahoma's election laws require the election board to call the white man a white man (by the simple process of elimination), and to call a Negro a Negro on the ballots (in this case, for United States Senator). At the bar of justice, and in particular at the bar of this Court, this neither discriminates against the white nor against the Negro, for both are held equal.

One of the difficult matters to understand is for one to realize that the Negro race deems itself to be a proud

race, one that fights for its rights, one that has been successful in numerous court battles in establishing itself to be the equal of any and all others in the eyes of the Constitution and laws of the United States, and in the next breath to realize that certain election officials are made defendants in an action for damages by one who alleges he has been damaged in the sum of $200,000.00 by being called a Negro, which, we repeat, is only the truth.

It is surely inconsistent for a race of people (in this case, the Negro race) to contend for equality in all respects, and then to turn to the other side and contend for damages when officially recognized as a race on the ballot. This constitutes the argument that "We are equal and entitled to all the rights of all people" and also to say "Do not call us what we are, for to do that is to damage our reputation and standing in society."

The very foundation of the cause of respondent McDonald is the assertion that he is hurt and damaged by being described as a "Negro." To be consistent with the philosophy of the contentions which have been successfully made on behalf of his race (and they are to be commended for their fight for rights), respondent McDonald should stand and be proud of being a member of this race, which has, by judicial decision and constitutional amendments (and even a Civil War), established itself to be the equal of the white race.

We submit to this Court that the contention of a denial of the equal protection of the laws in this case may not properly be heard and allowed, and that the decision of the Court of Appeals must be reversed, for it denies the very contention which has been made and upheld on behalf of the Negro race in many cases; that is, that all races are equal. To name an individual candidate as a member of a particular race of people can not be said to deprive him of the equal protection of the laws within the spirit of such decisions.

—7—

Respondent, in the instant case, wholly failed to invoke, pursue and exhaust the remedies provided by the law of the State of Oklahoma and by reason of such failure, he may not now resort to the Federal courts for alleged damages under 42 U. S. C., Section 1983.

It will be noted that in paragraph 4 of the petition filed by respondent in the district court below (T. 2), he admitted:

> "* * * plaintiff duly filed with the proper officer within the time provided by law a Notification and Declaration of candidacy in form provided by law and which was duly accepted by the defendants as such election officials and plaintiff's name was printed on the official ballot of the Democratic party as a candidate for the office of United States Senator from Oklahoma."

Nowhere in the petition will be found any statement that the respondent at any time protested or complained that he was being required to do or perform an act that

would in anywise jeopardize, infringe upon, or deprive him of any rights guaranteed to or saved for him by the Constitution or Laws of the United States of America. Many remedies were available. He could have entered formal protest. He could have demanded a hearing before the State Election Board. He could have invoked the superintending power of the state courts. None of these things were done. In fact, as is shown by the petition, he remained silent and quiescent. He accepted the privilege afforded him by being a candidate for the United States Senate subject to the action of the Democratic primaries in Oklahoma and it was not until after the primaries were held and the subsequent defeat suffered by the respondent that he then decided that he was injured and aggrieved.

In candor, it seems that the sequence of events as set forth in the petition and the filing of the action in the United States District Court for the Western District of Oklahoma, give full warrant to an inference that the respondent deliberately accepted, without complaint, the privilege accorded him under the Laws of Oklahoma and after failure at the polls he seeks to inflict penalties by way of damages against the members of the State Election Board.

These officers were acting under authority of law duly enacted by the Legislature of the State of Oklahoma under and by virtue of the authority vested in said Legislature by Section 4 of Article I of the Constitution of

the United States, *supra*. They were performing a duty imposed upon them by law. Nowhere in the petition is there even a faint suggestion that they acted with malice or with any of the elements of intentional or purposeful discrimination necessary to establish a denial of equal protection of the law. A few adjectives such as "discrimination", "distinction", "segregation" and "restriction" are used, but the sense in which said adjectives are used amount only to conclusions and do not bring the case within the rules laid down in *Snowden* v. *Hughes*, 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397, where the Court said in the seventh syllabus:

> "In action to recover for denial of plaintiff's civil rights for refusal of Illinois State Primary Canvassing Board to certify plaintiff as a candidate for the General Assembly, lack of necessary allegations in complaint of a purposeful discrimination between persons or classes of persons was not supplied by the epithets 'willful' and 'malicious' applied to board's action, or by characterizing board's refusal as an unequal, unjust, and oppressive administration of the laws of Illinois. Smith-Hurd Stat. c. 46, § § 8-13, 8-15, 10-14; Smith-Hurd Stats. Const. art. 4, § § 7, 8; 8 U. S. C. A. § § 43, 47(3); U. S. C. A. Const. Amend. 14."

It is respectfully urged that the Court of Appeals erroneously applied the reasoning in *Lane* v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281, 59 S. Ct. 872, for that in said case the right of franchise was the basis of the action and not the privilege of candidacy. This Court clearly held that a violation of the Fifteenth Amendment and

not the Fourteenth Amendment to the Constitution of the United States was involved.

In the Fifth syllabus is found the following language (Sup. Ct. Rep.):

> "A Negro against whom county election officials discriminated, acting under color of Oklahoma registration statute which inherently operated discriminatorily against Negroes, would be entitled to sue under federal statute imposing liability in action at law on person who, under color of statute, subjects citizens to deprivation of rights, privileges, or immunities secured by Constitution and laws, notwithstanding that Negro asserted that statute was unconstitutional as against contention that on assumption of invalidity of statute there was no statute under which Negro could register, and hence that no right to registration had been denied. 26 Okl. St. Ann. § 74; 8 U. S. C. A. § 43; U. S. C. A. Const. Amend. 15."

It will be noted from the above language that the statute then under consideration was found by the Court to be "inherently discriminatory". We respectfully urge that the statutes under consideration in the instant case are not inherently discriminatory for the reason that no man can be denied the right of becoming a candidate thereunder.

In the Seventh syllabus the Court held (Sup. Ct. Rep.):

> "Normally the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had."

Thus it can be seen that this Court made an exception in the *Lane* v. *Wilson case* by reason of the inherent discrimination contained in the statute, but at the same time adheres to the rule above set forth with relation to the requirement that the respondent should have exhausted his administrative remedies before resort to the federal courts could be had.

In the case of *Trudeau* v. *Barnes* (La., Fifth Circuit), 65 F. 2d 563 (cert. den. 290 U. S. 659, 78 L. Ed. 571, 54 Sup. Ct. 74), a suit for damages had been filed by Antoine M. Trudeau against Charles S. Barnes seeking to recover in an action at law damages for being deprived of the right to register as a voter of Orleans Parish in the State of Louisiana. Recovery was sought under the provisions of 42 U. S. C. Section 1983, *supra*. A judgment dismissing the action was entered and a subsequent appeal taken. In the third syllabus, the Court held as follows:

> "One denied registration as voter, before suing for damages under federal statute, must exhaust remedy afforded him by State Constitution."

In the body of the opinion, the Court further said:

> "The Louisiana Constitution protects every citizen who desires to register from being arbitrarily denied that right by the registrar of voters by giving the applicant a right to apply without delay and without expense to himself to the trial court for relief, to submit his qualifications to vote to a jury, and to have them finally passed upon by an appellate court. It is idle to say that the defendant as reg-

istrar had the arbitrary power to deny plaintiff the right to vote. We cannot say, and refuse to assume, that, if the plaintiff had pursued the administrative remedy that was open to him, he would not have received any relief to which he was entitled. At any rate, before going into court to sue for damages he was bound to exhaust the remedy afforded him by the Louisiana Constitution. *First National Bank of Greeley, Colo.* v. *Weld County*, 264 U. S. 450, 44 S. Ct. 385; 68 L. Ed. 784; *First National Bank* v. *Gildart* (C. C. A.) 64 F. 2d 873, Fifth Circuit, decided April 22, 1933."

The facts in the above case involved rights and privileges secured under both the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The Fifteenth Amendment is not involved in this action.

We firmly believe and therefore submit that the *privilege* of being a candidate for a public office and the *right* to vote in elections generally are quite distinguishable as a matter of law. To become a candidate one must either accept the law as written and comply with it or he should act with all necessary prudence and dispatch to show good cause why he should not comply.

As heretofore stated, the Legislature of Oklahoma had acted in accordance with the authority delegated by the Federal Constitution. The respondent, without complaint, made himself the beneficiary of the privileges afforded by his quiescent acceptance of the provisions of law applicable and the filing of his Notification and Dec-

laration. A very similar situation is found in the case of *Johnson* v. *Stevenson*, 170 F. 2d 108 (cert. den. 336 U. S. 904, 73 L. Ed. 1069, 69 S. Ct. 491), *supra*. The first syllabus reads:

> "Federal district court was without jurisdiction to interfere by injunction in a United States senatorial primary in Texas based on the illegal votes and returns involving in effect the contest of an election, where the Texas statutes afforded ample machinery therefor notwithstanding claim that there was not time to review the state-wide primary by an election contest before the general election came on. U. S. C. A. Const. art. 1, § 5; art. 3, § 2."

The court, in the *Stevenson case*, cited *United States* v. *Gradwell*, 243 U. S. 476, 488, 489, 61 S. Ct. 857, 37 L .Ed. 407, which held that no provision of the federal Constitution or statutes secures the rights of a candidate for nomination, and *United States* v. *Bathgate*, 246 U. S. 220, 226, 227, 62 L. Ed. 676, 38 S. Ct. 269, wherein the distinction was made between the personal right of the voter and the general right of a candidate. The court pointed out that no case had been found wherein one claiming a nomination in a primary held under State law, though it be a part of the state election machinery, has any right secured by the laws of the United States.

We therefore submit that the decision of the Court of Appeals should be reversed and the judgment of the district court reinstated (ordering dismissal) for the rea-

son that respondent wholly failed to pursue available State remedies before resort to the federal courts.

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Respondent is prevented by the doctrine of equitable estoppel from maintaining his action for damags in the federal courts (or in any other courts).

The allegations of the respondent's petition depict a series of voluntary actions, without protest or complaint, upon the part of the respondent such as (1) filing within the time provided by law a Notification and Declaration of candidacy in form provided by law and (2) placing the word "Negro" descriptive of his race, on said Notification and Declaration as is required by law, and (3) accepting the benefits of the privilege to become a candidate afforded him by the filing of such Notification and Declaration.

We firmly believe, and therefore urge, that by these voluntary acts of acceptance, silence, inaction, acquiescence, all voluntarily done, the respondent has estopped himself from now complaining. The generally accepted rules which guide the courts in such matters are found in 19 Am. Jur., beginning at page 648. We quote in part from the following numbered paragraphs:

> "Section 49. KNOWLEDGE OF FACTS AND RIGHTS. It is essential to the doctrine of equitable estoppel that the party sought to be estopped should have had knowledge of the facts, or at least that he should have had the means at hand of knowing all

the facts or have been in such a position that he ought to have known them * * *.

"Section 50. INCONSISTENCY. Generally speaking, a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action. As has already been pointed out, this rule is sometimes said not to be strictly one of equitable estoppel, but rather one of quasi estoppel by election * * *.

"Section 55. SILENCE OR INACTION. An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by,' and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent' * * *.

"Section 62. ACQUIESCENCE. The doctrine of equitable estoppel is frequently applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he, or those by whose acts he is bound, has acquiesced. Declarations or conduct which might not of themselves amount to an estoppel may become such by acquiescence. * * *

"Section 64. ACCEPTANCE OF BENEFITS. Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instru-

ment, regulation, or statute which he might have rejected or contested. * * *"

Many cases are cited to support the above rules, but because of their universal acceptance we shall not burden this petition with such citations. We do, however, call the Court's attention to the following cases which generally hold that one cannot accept the benefits of statutory provisions and thereafter be heard to complain.

In the case of *Frost* v. *Corporation Commission of State of Oklahoma et al.*, 278 U. S. 515, 49 Sup. Ct. 235, the eighth syllabus reads as follows:

> "One who has acquired rights of property necessarily based on statute may not attack that statute as unconstitutional, since he cannot both assail it and rely on it in the same proceeding."

The same reasoning is followed in *Fitzsimmons et al.* v. *Rauch et al.*, 195 Okl. 529, 159 P. 2d 264. The ninth syllabus sets forth the principles as follows:

> "When constitutional right being urged is one of specific application to party urging it in particular case, and rule of estoppel is susceptible of application in the specific instance without prejudice to the general good in construction of constitution and can be applied in line with general rules of law governing estoppel, individual will be held estopped from asserting the unconstitutionality of an act which he has invoked or relied upon to his advantage."

In *Owens* v. *Corporation Commission*, 41 F. 2d 799, a three-judge court passed squarely on the question of estoppel. The first and second syllabi read as follows:

"Plaintiff, having received licenses under statute for operation of cotton gins, held precluded from attacking statute regulating gins as unconstitutional (Comp. St. Okl. 1921, Section 3712, as amended by Laws 1929, Sp. Sess., c. 240, section 1).

"One may not take advantage of law when it suits him and then attack it when it does not."

In the body of the opinion we find the following language:

"The power to fix rates is presented by the issues, but the defendants have interposed a plea of estoppel, which is insisted upon. The plaintiff asked for and received licenses to operate six gins in five towns, under this statute. He used this law to keep others out of these towns, theoretically at least. Undoubtedly, men may not take advantage of a law when it suits them, and then attack it when it does not. *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 308, 49 S. Ct. 150, 73 L. Ed. 390; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 37 S. Ct. 609, 61 L. Ed. 1229; *Electric Co.* v. *Dow*, 166 U. S. 489, 17 S. Ct. 645, 41 L. Ed. 1088; *St. Louis Malleable Casting Co.* v. *Prendergast Const. Co.*, 260 U. S. 469, 43 S. Ct. 178, 67 L. Ed. 351; *Pierce* v. *Somerset Railway*, 171 U. S. 641, 19 S. Ct. 64, 43 L. Ed. 316; *Grand Rapids & Indian Ry. Co.* v. *Osborn*, 193 U. S. 17, 24 S. Ct. 310, 48 L. Ed. 598; *Slick* v. *Hemaker* (8 C. C. A.) 28 F. 2d 103, 12 C. J. 769, *et seq.*

* * * * * * * * *

"We conclude the plaintiff is not in position to challenge the statute, and the bill will therefore be dismissed. The restraining order will be dissolved."

CONCLUSION

In consideration of the above and foregoing, petitioners pray the order and judgment of the Court (a) that the writ of *certiorari* be granted; (b) that the decision of the United States Court of Appeals be vacated and reversed; (c) that the judgment of the United States District Court for the Western District of Oklahoma be reinstated and affirmed; and (d) that the costs herein be assessed against respondent.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
State Capitol,
Oklahoma City, Oklahoma;

EDWARD M. BOX,
Assistant Attorney General,
Leonhardt Building,
Oklahoma City, Oklahoma;

JAMES P. GARRETT,
Assistant Attorney General,
State Capitol,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

SEPTEMBER, 1955.

APPENDIX A

Section 11, Article 23, Oklahoma Constitution:

"Wherever in this Constitution and laws of this State, the word or words, 'colored' or 'colored race', 'Negro' or 'Negro race', are used, the same shall be construed to mean or apply to all persons of African descent. The term 'white race' shall include all other persons."

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26 O. S. 1951 Section 162:

"Any qualified elector, as defined in the Constitution and laws of the State of Oklahoma, who is a member of a political party, and who is now and has been affiliated with such legally recognized party at whose hands he seeks the nomination, shall have his name printed on the official ballot of his party for an office to which he is eligible in any primary election, upon filing with the proper officer, within the time provided by law, a Notification and Declaration of candidacy. Said Notification and Declaration shall be in the following form, and shall be filled in as to all the requirements therein contained, and the declarations therein shall be subscribed and sworn to by the person making the same, before any officer qualified to administer an oath.

"Said Notification and Declaration shall be in the following form:

"For the purpose of having my name placed on the official primary election ballot as a candidate for nomination by the _____ (name of party), Party, I, _____, (Legal name), do solemnly swear (or affirm), that I reside at No. _____ Street, in the City of _____; that my post office address is. _____, State of Oklahoma; that my age is, _____; that my race is

....., (White or Negro); that my occupation is, ...; and that I am a registered ..... (Name of party), (Party), voter in ..... (Name or No. of Precinct), precinct, City of ....., County of .....; that I believe in the principles of said ..... (Name of party), Party, and intend to support its principles and policies, and vote for its nominees at the coming general election, and that I have affiliated with such party and that I supported its nominees at the last statewide general election, or was prevented from doing so by reason of .....; that, if nominated as a candidate of said ..... (Name of party), party at the said ensuing election, I will accept such nomination; that I am not affiliated directly or indirectly with the Communist party, the Third Communist International, or with any foreign political agency, party, organization or government, nor do I advocate revolution, teach or justify a program of sabotage, force and violation, sedition or treason against the government of the United States or of this State, nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the government of the United States or of this State, or change in the form of government thereof by force or any unlawful means; that I will not knowingly violate any election law or any law defining or relating to corrupt and fraudulent practice in campaigns or election in this State, and, if finally elected, I will qualify for said office.

"You are also notified that I have appointed and authorized ..... of ..... and ..... of ..... to expend money in defraying the expenses of my campaign. (If no one has been appointed or authorized, leave blank).

"I have not and will not authorize any person to expend money or other things of value in the interest of my candidacy, but I will, in person, account

for all the money or other things of value expended in the interest of my candidacy, as required by law.

(Signature of legal name of candidate)

(Typewrite your name here)

"Subscribed and sworn to before me by ..... this ..... day of ....., 19.....

(Signature of officer)

(Title of officer).

My Commission Expires .....

"The said candidate shall at the time of filing his notification and declaration file therewith an affidavit of two reputable electors, members of the same party to which the applicant belongs, which affidavit shall be in the following form, and filled out so as to meet all the requirements indicated therein:

"State of Oklahoma, ... County.

"We, ... and ..... do solemnly swear (or affirm), that we are qualified electors and members of the ..... (Name of party), Party, and have affiliated with said party, and supported its nominees at the last statewide general election; that we are residents and legal voters of the Township, City, of ....., County of ....., State of Oklahoma; that we are personally acquainted with ....., who files the hereto attached notification and declaration, and we know him to be a discrete citizen, and member of the ..... Party, and that, to the best of our knowledge and belief, he has affiliated with and supported said party, as defined in the primary election law; that he is a resident of the city, county and state, set out in his notification and declaration, and is not directly or indirectly affiliated with the Com-

munist Party or other subversive groups, and we believe him to be qualified to fill the office of .....

.....
(Signature of Affiants)

"Subscribed and sworn to before me by ..... and ..... this the ..... day of ....., 19.....

.....
(Signature of officer)

My Commission Expires..... .....
(Title of officer)

"Said notification and declaration, and the accompanying affidavits may be on the same or separate sheets, but shall be filed together and at the same time, and when so filed with the proper officer, it shall be the duty of said officer, upon the candidate's compliance with requirements of this Act, to have printed the applicant's name on the ballot, according to the primary election law, under the penalties provided therein. This Act, except as to declaration of party affiliation, shall apply to independent and non-partisan candidates. The petition of a non-partisan candidate, or of the people to place a non-partisan candidate's name upon the ballots, shall be filed with the Secretary of the proper Election Board within the time prescribed by law for the filing of petitions of notification and declaration of candidacy. Any wilful or intentional misstatement of fact contained in said notification and declaration shall constitute a fraudulent act.

"All notification and declaration of candidacy for presidential electors, United States Senators, Representatives in Congress, State Officers, Members of the Senate and House of Representatives, District Judges, and for all other offices for which the electors of the entire state, or subdivision thereof greater than a County are entitled to vote, shall be filed with the Secretary of the State Election Board. A"

nominating petitions for County and Township officers or offices for which the electors of a subdivision of a county are entitled to vote, shall be filed with the Secretary of the County Election Board."

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26 O. S. 1951 Section 162a:

"Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the White race, shall have his race designated upon the ballots in parenthesis after his name. This provision shall apply both to Primary and General Elections or either of them. To avoid confusion or misunderstanding among the voters the Election Board shall have the right to place after any candidate's name in parenthesis any words not exceeding five in number, which will identify or distinguish said candidate from any other person. Such words shall be added only after notice to the candidate involved. This provision shall apply to both Primary and General Elections or either of them."

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42 U. S. C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

A. B. McDONALD,

Plaintiff,

VERSUS

GEORGE D. KEY, BENJAMIN M. CASSITY and J. WM. CORDELL,

Defendants.

NO. 6366—Civil.

MEMORANDUM

The sole question for determination is whether the placing of the word "Negro" in parenthesis after a candidate's name on an Oklahoma primary ballot as required by State statute deprives the candidate of the equal protection of the laws or of any rights, privileges or immunities secured to him by the Constitution and Laws of the United States.

Material and relevant parts of the Constitution and Laws of the State of Oklahoma are:

26 O. S. A., Sec. 162 (in part):

"* * * any qualified elector, * * *, shall have his name printed on the official ballot * * *, upon filing with the proper officer, within the time provided by law, a Notification and Declaration of candidacy * * *.

"Said Notification and Declaration shall be in the following form:

"* * *; that my race is _____, * * *."
(white or negro)

26 O. S. A., Sec. 162a (in part):

"Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the White race, shall have his race designated upon the ballots in parenthesis after his name. This provision shall apply both to primary and general elections or either of them. * * *."

Section 6, Article 3 of the Oklahoma Constitution (in part):

"In all elections by the people the vote shall be by ballot and the Legislature shall provide the kind of ticket or ballot to be used and make all such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot; * * *."

Section 11, Article 23 of the Oklahoma Constitution (in part):

"Whenever in this Constitution and Laws of this State the word * * * 'Negro' * * * are used, the same shall be construed to mean or apply to all persons of African descent. The term 'white race' shall include all other persons."

Plaintiff became a Democratic candidate for the office of United States Senator from the State of Oklahoma by compliance with the election laws thereof. Pursuant to 26 O. S. A. 162 he notified the State Election Board of his candidacy which notification disclosed the fact that he is a member of the African race. The State Election Board placed the word "Negro" in parenthesis

after his name on the ballot. The candidate was unsuccessful in the July 6, 1954 primary election and thereafter this action was filed seeking actual and exemplary damages against the individual members of the Oklahoma State Election Board.

The placing of the word "Negro" on a ballot after the name of a candidate is merely descriptive and properly serves to inform the electors of the fact that the candidate is of African descent. It likewise serves to inform the voters that the other candidates are members of the "white race." It is, therefore, my opinion that the plaintiff has not been deprived of the equal protection of the laws or any rights, privileges or immunities secured by the Constitution and Laws of the United States.

I have also come to the conclusion that since the plaintiff failed to exhaust the remedies provided by the laws of the State of Oklahoma, this court is without jurisdiction.

The complaint is, therefore, dismissed. Counsel will prepare and submit proper order.

Dated this 18th day of October, 1954.

Stephen S. Chandler, Jr.,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

A. B. McDONALD,

Plaintiff,

VERSUS

GEORGE D. KEY, BENJAMIN M. CASSITY and
J. WM. COPDELL,

Defendants.

NO. 6366

JUDGMENT

The above entitled matter came on for hearing before the undersigned Judge of said Court on the motion of the defendants' to dismiss said action upon the grounds that the complaint failed wholly to state a claim against said defendants, or either of them, upon which relief could be granted by the Court. On September 27, 1954, the plaintiff appeared in his own proper person and by his attorney, J. B. Dudley, and the defendants and each of them, appeared in person and by Edward M. Box, their attorney, Fred Hansen, First Assistant Attorney General of Oklahoma, appearing "of counsel" for defendants. Oral arguments were presented and the Court took said cause under advisement, allowing time for the plaintiff to present briefs, all of which was done.

And now, on this 18th day of October, 1954, after having considered the argument of counsel, the briefs filed herein and being fully advised in the premises, the Court finds:

That the placing of the word "Negro" on a primary or general election ballot after the name of a candidate who is of African descent is merely descriptive and serves to inform the electors that the candidate is of African descent and that the other candidates are members of the "white race" and that by reason of the use of said word "Negro" the plaintiff herein has not been deprived of the equal protection of the laws or any rights, privileges or immunities secured by the Constitution and Laws of the United States of America.

The Court further finds that in the instant case the plaintiff failed wholly to invoke, pursue and exhaust the remedies provided by the Laws of the State of Oklahoma and that by reason of such failure, this Court is without jurisdiction of the cause.

For the reasons above stated, the Court finds further that the motion to dismiss the complaint or petition filed herein is in all things good and should be by the Court sustained.

IT IS, THEREFORE, THE ORDER, JUDGMENT and DECREE of the Court that the motion to dismiss filed by the defendants, and each of them, be and the same is hereby sustained and the above styled and numbered cause is hereby dismissed and the cost herein accrued are assessed againt the plaintiff, for all of which let execution issue.

/s/ Stephen S. Chandler, Jr.
United States District Judge.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OPINION No. 5048—MAY TERM, 1955

A. B. McDONALD,

Appellant,

VERSUS

GEORGE D. KEY, BENJAMIN M. CASSITY and J. WM. CORDELL,

Appellees.

Appeal from the United States District Court for the District of Oklahoma.

(July 21, 1955)

A. B. McDonald *Pro se.*

Fred Hansen, First Asst. Atty. Gen., and Edward M. Box (Mac Q. Williamson, Atty. Gen. of Oklahoma, was with them on the brief), for appellees.

Before PHILLIPS, Chief Judge, MURRAH, Circuit Judge, and WALLACE, District Judge.

PHILLIPS, Chief Judge.

This is an action for damages brought under 42 U. S. C. A., § 1983, predicated on an allleged violation of the Fourteenth Amendment.

The appellees, defendants below, were the duly appointed, qualified, and acting members of the State Election Board of the State of Oklahoma.

McDonald, the plaintiff below, is a member of the Negro race. Prior to the primary election in Oklahoma, held on July 6, 1954, plaintiff duly and timely filed a notification and declaration of his candidacy for nomination for the office of United States Senator on the Democratic ticket. The members of the Election Board placed plaintiff's name upon the ballot for such primary election and placed in parentheses after plaintiff's name on such ballot the word "Negro."

Section 11, Art. 23 of the Oklahoma Constitution, in part, reads as follows:

> "Wherever in this Constitution and laws of this State the word * * * 'Negro' * * * are used, the same shall be construed to mean or apply to all persons of African descent. The term 'white race' shall include all other persons."

26 O. S. A., § 162, in part, reads:

> "Any qualified elector, * * * shall have his name printed on the official ballot * * *, upon filing with the proper officer, within the time provided by law, a Notification and Declaration of candidacy, * * *
>
> "Said Notification and Declaration shall be in the following form:
>
> " '* * *; that my race is _____, * * *'."
> (White or Negro)

26 O. S. A., § 162a, in part, reads:

> "Every candidate shall state in his notification and declaration his race. Any candidate who is other than of the White race, shall have his race designated upon the ballots in parenthesis after his name. This

provision shall apply both to Primary and General Elections or either of them * * *."

The trial court held that the placing of the word "Negro" on a primary or general election ballot after the name of the candidate, who is of African descent, is merely descriptive and serves to inform the electors that the candidate is of African descent, and that the other candidates are members of the White race; that plaintiff was not denied the equal protection of the laws guaranteed by the Fourteenth Amendment; and that plaintiff had wholly failed to invoke and exhaust the remedies provided by the laws of the State of Oklahoma and, therefore, the court was without jurisdiction. From a judgment dismissing the action, plaintiff has appealed.

A candidate in a primary or general election in Oklahoma must file a notification and declaration with the proper officer, in which he is required to state whether he is a member of the White or Negro race. If he states that he is a member of the Negro race, that fact must be stated in parentheses after his name on the ballot. Under the Oklahoma constitutional provision, the phrase "white race" includes not only that race, but all other races, except the Negro race. Thus, it will be seen that there is a direct discrimination between members of the Negro race and members of the White, Yellow, and other races, all embraced in the phrase "white race," resulting in a denial under color of law of equality of treatment

with respect to the members of the Negro race who run for office in Oklahoma.

In *Lane* v. *Wilson*, 307 U. S. 268, in which the right of the plaintiff to maintain the action was upheld, the basis of the action, as in the instant case, was inequality of treatment under color of law and not the denial of the right to vote[1]. In that case, the court also held it was not necessary for a plaintiff who sues for damages under 8 U. S. C. A., § 43 (§ 1979 of the Revised Statutes), now 42 U. S. C. A., § 1983, to exhaust the remedies of a judicial nature provided by the State of Oklahoma[2].

Section 2, Art. 7, of the Constitution of Oklahoma, in part, provides:

> "* * * The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. * * *"

The relief provided by such § 2, is clearly of a judicial nature. We know of no purely administrative remedy that was open to the plaintiff.

Counsel for appellees contend that plaintiff is estopped by reason of his having filed his notification and declaration and having run for nomination in the primary election. We think there is no basis for the asserted estoppel. Compliance with 26 O. S. A., § 162 was nec-

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[1]See also Nixon v. Herndon, 273 U. S. 536, 541.

[2]To the same effect see Bruce v. Stillwell, 5 Cir., 206 F. 2d 554 and cases therein cited at page 556; Hall v. Nagel, 5 Cir., 154 F. 2d 931.

essary in order for plaintiff to get his name on the ballot. He does not complain of the requirements of that section. What he complains of is the action of the Election Board taken under color of 26 O. S. A., § 162a. If that section is unconstitutional, *and we so hold*, then the Election Board was not justified in following it, even if plaintiff complied with 26 O. S. A., § 162. Section 162a gave no benefits to plaintiff. It merely provided for discrimination with respect to him in the placing of his name on the ballot with the notation thereafter in parentheses, "Negro." Since plaintiff availed himself of no rights or benefits under 26 O. S. A., § 162a, his action is not barred by estoppel.

The judgment dismissing the action is reversed and the cause remanded for further proceedings in accordance with this opinion.